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No. 99-1084

IN THE

SUPREME COURT OF THE UNITED STATES

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

RAYMOND NORRIS, *et al.*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF IN FURTHER SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Petitioner, Metro-North Commuter Railroad Company ("Petitioner" or "Metro-North"), respectfully submits this Reply Memorandum of Law for the limited purpose of responding to two new assertions contained in Respondents' Brief in Opposition to Petition for Writ of Certiorari ("Resp. Br."): first, that, in determining that plaintiffs had satisfied the requirements of Fed. R. Civ. P. 23 (a), the Second Circuit conducted a rigorous analysis of the expert reports submitted by the parties and on that basis found the report of Metro-North's statistical expert to be unpersuasive; and second, that the fact that Metro-North maintains centralized employment

policies and practices distinguishes this case from cases in other circuits that have found commonality lacking where the challenged employment decisions were made at the local level.[1] A review of the decision below, as well as the applicable authorities elsewhere, reveals that these contentions are misplaced and that, as a result, Respondents' effort to dispute the existence of a split among the circuits on the critical legal issues is unavailing.

I

THE SECOND CIRCUIT DID NOT PERFORM A RIGOROUS ANALYSIS OF THE STATISTICAL EVIDENCE

Rather than dispute Petitioner's argument that the majority of circuit courts favor a rigorous analysis of the statistical evidence at the class certification stage, Respondents maintain that the Second Circu[illegible] in fact

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[1] Respondents' alternative assertion that the Petition is moot in light of the intervening advice from the district court on its disposition of the Rule 23 (b) issue (*see* Resp. Br. at 29-30) is misplaced because there has been no final judgment dismissing this lawsuit, and plaintiffs will undoubtedly appeal the Rule 23 (b) ruling once a final judgment is rendered. *See Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1979) ("a decision that is 'final' for purposes of appeal does not absolutely resolve the case or controversy until the time for appeal has run"). The Supreme Court therefore has the discretion to grant the Petition and reverse the Second Circuit's ruling on the Rule 23 (a) issue, thereby obviating the need for further litigation of the Rule 23 (b) issue.

conducted such an analysis — one that was much more thorough than the analysis performed by the district court — and that the report of Metro-North's expert, Dr. David Evans, did not pass muster under this analysis. (Resp. Br. at 16) As a review of the text of the panel decision reveals, nothing could be further from the truth.

The panel's rejection of the district court's ruling was based on its finding that "statistical dueling" between the experts is not relevant to the certification determination. (Pet. App. A-15) For that reason, the Court declined to consider at all Dr. Evans' critique of the report of plaintiffs' expert, Dr. Zellner.[2] Instead, it concluded that Rule 23 (a)'s requirements were satisfied merely because Dr. Zellner's report, standing alone, made a facial showing of commonality. Had the Court considered Dr. Evans' report, there is every reason to believe that it would have upheld the district court's endorsement of Dr. Evans' analysis, since the panel observed, *inter alia*, that "Metro-North's criticism of the Class Plaintiffs' evidence may prove fatal at the merits stage." (*Id.*)

By mistakenly characterizing the panel decision as having thoroughly evaluated, rather than ignored, the report of Metro-North's expert, Respondents have unwittingly endorsed Petitioner's request for certification. As Respondents readily concede (Resp. Br. at 20-21), circuit

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2 Significantly, the Court declined to consider, not only the independent analysis that Dr. Evans performed in order to demonstrate the absence of any basis for finding class-wide discrimination, but also his theories for criticizing Dr. Zellner's analysis, including his "fallacy of composition" analysis. (*See* Cert. Pet. at 9)

courts elsewhere have upheld the denial of class certification motions based on a rigorous analysis of the expert reports, consistent with their understanding of the Supreme Court's pronouncement in *General Tel. Co. v. Falcon,* 457 U.S. 147 (1982). *See, e.g., Chaffin v. Rherm Mfg. Co.*, 904 F.2d 1269 (8th Cir. 1990); *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267 (4th Cir. 1980). It is precisely for this reason that the Second Circuit's decision should be reviewed.

II

THE SECOND CIRCUIT'S DECISION CANNOT BE DISTINGUISHED FROM THE CONTRARY RULINGS ON COMMONALITY RENDERED BY COURTS IN OTHER CIRCUITS BASED ON THE PRESENCE OF CENTRALIZED EMPLOYMENT PRACTICES

In seeking to justify the Second Circuit's finding that the mere delegation of subjective employment decisions to lower level supervisors can satisfy Rule 23 (a)'s commonality standard, Respondents contend that cases where courts in other circuits that have ruled otherwise are distinguishable because there were no centralized employment policies or practices in those cases. (Resp. Br. at 26) A review of the pertinent decisions reveals that this is not true. *See, e.g., Coser v. Moore,* 739 F.2d 746, 751 (2d Cir. 1984) ("Stony Brook's affirmative action program subjects its employment decisions to mandatory procedures and to review by affirmative action officials at Stony Brook"); *Bradford v. Sears, Roebuck and Co.*, 673 F.2d 792, 796 (5th Cir. 1982) (record before the Fifth Circuit "contain[ed] a serious question whether or not one employment scheme is utilized by Sears, a nationwide operation, throughout its various [operations] in Mississippi"); *Appleton v. Deloitte & Touche LLP*, 168 F.R.D. 221, 232 (M.D. Tenn. 1996) ("criteria and

procedures for hiring, evaluating, promoting, and compensating are set nationally and followed nationwide by the local decisionmakers, . . . [and] all Defendant's offices use a uniform application form, hiring interview form, and performance evaluation form"); *De La Fuente v. Chicago Tribune Co.*, No. 84 C 4596, 1985 U.S. Dist. LEXIS 17512, at *3 (N.D. Ill. Jul. 24, 1985) ("'the heart of [p]laintiff's claim is the existence of a centrally administered excessively subjective system of employee evaluations which adversely affects a broad class of minority employees'"); *Williams v. New Orleans Pub. Serv., Inc.*, 30 Fair Empl. Prac. Cas. (BNA) 1127 (E.D. La. 1982) (promotions made "in accord with general policy promulgated by the Personnel Department"); *Harrison v. Simon*, 91 F.R.D. 423, 429 (E.D. Pa. 1981) ("plaintiffs allege that the defendants have maintained 'policies and practices which utilize subjective non-job related criteria in promotion decisions, which criteria operate disparately to affect adversely both blacks and females because of their race or sex, respectively'"); *Wells v. General Elec. Co.*, 78 F.R.D. 433, 436 (E.D. Pa. 1978) ("plaintiff asserts that Corporate Headquarters has formulated a centralized policy which guides the careers of its exempt employees without technical degrees").

In these cases, as well as other cases cited in the Petition, motions for class certification were denied, not because of the absence of centralized policies or practices, but rather because of the absence of any evidence that these policies or practices were discriminatory. *See Appleton*, 168 F.R.D. at 232 (while "[t]he evidence indicates that the role of the national personnel office is to provide information to and to act in an advisory role to local decisionmakers [and to] make[] any suggestions with respect to employment decisions," plaintiffs have not challenged any of those suggestions as discriminatory); *Brooks v. Circuit City Stores, Inc.*, 71 Fair Empl. Prac. Cas. (BNA) 102, 105 (D. Md. 1996)

("Plaintiffs do not and cannot allege that subjective decision-making itself is a practice that discriminates"); *Stambaugh v. Kansas Dep't of Corrections,* 151 F.R.D. 664, 676 (D. Kan. 1993) (plaintiffs can "make no showing of a causal connection between the lack of central office review and the alleged acts of discrimination, and, without that, the court cannot find common questions of fact or law sufficient to justify class certification"); *De La Fuente,* 1985 U.S. Dist. LEXIS 17512 at *4 ("By requiring 'significant proof' of a policy, the Court [in *Falcon*] meant not proof that a defendant uses a subjective procedure, but rather proof that this procedure discriminates against a significant number of people"); *Wells*, 78 F.R.D. at 438 ("any discrimination will flow from the application of the policy rather than the formulation of the policy at the corporate level"). Here, since plaintiffs concede that the centralized practices and policies are not discriminatory, these authorities would clearly compel a finding that Rule 23 (a)'s standards have not been satisfied.

It was for this reason that the panel devised a new theory to justify its departure from the prior authorities, pursuant to which the mere delegation of decision-making authority, without more, can satisfy the requirement of commonality. As so stated, however, and particularly when combined with the Court's diminished requirements for showing statistical evidence in support of the class claims (*see* Pet. Br. at 21-24), the Second Circuit's approach to commonality represents a sharp departure from the approach taken in other Circuits.

CONCLUSION

For the foregoing reasons, and those stated in Petitioner's original Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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